



STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 9th Floor
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

IN THE MATTER OF THE PETITION OF)	SEVENTH AMENDED
FISHERMEN'S ATLANTIC CITY WIND FARM, LLC)	PREHEARING ORDER
FOR THE APPROVAL OF THE STATE WATERS)	
PROJECT AND AUTHORIZING OFFSHORE WIND)	
RENEWABLE ENERGY CERTIFICATES)	DOCKET NO. EO11050314V

Parties of Record:

Stefanie Brand, Director, Division of Rate Counsel
Stephen B. Pearlman, Esq., Inglesino, Pearlman, Wyciskala & Taylor LLC, on behalf of
Fishermen's Atlantic City Windfarm, LLC
Phillip J. Passanante, Esq., on behalf of Atlantic City Electric Company
Gregory Eisenstark, Esq., on behalf of Jersey Central Power & Light Company
Alexander C. Stern, Esq., on behalf of Public Service Electric & Gas Company
Susan J. Vercheak, Esq., on behalf of Rockland Electric Company

BY PRESIDENT ROBERT M. HANNA:

By Order dated July 29, 2013, in Docket No. EO11050290V, the Board considered two stipulations submitted by the parties: 1) a stipulation on the joint record; and 2) a stipulation on the wind project. The Board approved the stipulation on the joint record and set August 9, 2013, as the date the paper record would close. The Board rejected the project stipulation. In rejecting the project stipulation, the Board directed me to set hearing dates, unless Fishermen's Atlantic City Windfarm ("FACW") waived the opportunity for a hearing.

On July 31, 2013, FACW requested a thirty-day extension of time to supplement the record, and consented to an extension of the procedural schedule of "no less than thirty days." By Order dated August 5, 2013, I denied the request for an extension of time to supplement the record. The August 5th Order also informed the parties that a hearing in this matter would be held on August 26, 27, 28 and September 3, 2013, unless the parties waived such right and decided to proceed on the papers.

On August 9, 2013, FACW filed Updated Testimony of Chris Wissemann and Steve Gabel in support of its application. On August 15, 2013, Rate Counsel filed a motion to supplement the record with Supplemental Testimony of David E. Dismukes. In support of the motion Rate Counsel indicated that the testimony compared the economic differences between the offshore renewable energy certificate ("OREC") proposal contained in FACW's August 9, 2013, filing; the June 28, 2013, project stipulation; and FACW's March 25, 2013, rebuttal testimony. Rate Counsel further indicated that the information was not available prior to FACW's August 9th filing and the information "may affect the decision of the Board in this matter." (Rate Counsel Letter Brief at 2, In re Petition of FACW, Docket No. EO11050314V (August 15, 2013)).

On August 9, 2013, FACW advised the Board that it would proceed to a hearing, unless the parties could reach a settlement beforehand. On August 19, 2013, I issued the Sixth Amended PreHearing Order confirming the hearing dates for August 26, 27, 28 and September 3, 2013, granting Rate Counsel's Motion to Supplement the Record, and setting forth additional procedural items.

On August 22, 2013, the parties held a status conference. During the status conference the parties agreed that hearing dates initially scheduled for August 26, 27, and 28th were not necessary and that the hearing could begin on September 3rd. On August 26, 2013, staff filed a motion seeking permission for one of its experts to testify remotely. FACW filed an opposition on August 28, 2013, and raised additional procedural objections. The issues identified in those filings are discussed below.

Expert Testimony by Video or Telephone

On August 26, 2013, staff filed a motion seeking permission to allow Mr. Edwin Coolen of Outsmart to testify by video-conference or telephone. Mr. Coolen resides in the Netherlands and indicated by certification that he was unable to attend the hearing in person due to scheduling conflicts and other issues. (Coolen Certification, In re Petition of FACW, Docket EO11050314V (August 26, 2012)). On August 28, 2013, FACW objected to staff's request and insisted on the opportunity to cross-examine Mr. Coolen in person. (FACW Letter Brief at 3, In re Petition of FACW, Docket EO11050314V (August 28, 2012)). FACW argued that its right to cross-examination would be unduly infringed unless the witness appeared in person. Rate Counsel consented to testimony by video-conference but objected to telephone testimony. The Intervenor did not file a position.

The Administrative Procedures Act allows for testimony by telephone when good cause exists. N.J.A.C. 1:1-15.8. Factors to consider for establishing good cause include:

1. Whether all parties consent to the taking of testimony by telephone;
2. Whether credibility is an issue;
3. The significance of the witness' testimony;
4. The reason for the request to take testimony by telephone; and
5. Any other relevant factor.

[Ibid.]

When consent is lacking, the hearing officer may consider other factors such as exigency. State v. Santos, 210 N.J. 129, 141 (2012). "First, the court must determine whether the opposing party has consented to the testimony or whether there is a special circumstance, also referred to as an exigency, compelling the taking of telephone testimony." Ibid. (internal quotation

marks omitted) (quoting Aqua Marine Products, Inc. v. Pathe Computer Control Sys. Corp., 229 N.J. Super. 264, 275 (App. Div. 1988)).

The instant matter is distinguishable from Santos and Aqua Marine Products because Mr. Coolen pre-filed direct testimony and FACW has filed rebuttal testimony. In addition, Mr. Coolen is part of a team of individuals who contributed to staff's expert report and the remaining contributors are available for in-person cross-examination. Therefore, the procedural posture of this case is quite different than Santos or Aqua Marine Products and militates against the due process violations that FACW raises.

Nonetheless, Staff has not demonstrated exigent circumstances that necessitate Mr. Coolen's remote testimony. Similarly, Mr. Coolen has not described exigent circumstances that would prohibit his travel to the hearing. Considering these facts and circumstances, staff's motion was **DENIED** and I adjourned the hearing until such time that Mr. Coolen may testify in person. The advising Deputy Attorney General notified the parties of the adjournment on August 28, 2013.

Expert Testimony by a Panel

Concerning the format of expert testimony, staff informed FACW that its expert - Boston Pacific - would testify as a panel. On August 26, 2013, FACW objected to "panel testimony" and averred that it should be allowed to cross-examine each witness in seriatim. (FACW Letter Brief at 3, In re Petition of FACW, Docket EO11050314V (August 28, 2012)). In part, FACW argued that testimony by a panel would infringe on its ability to effectively cross-examine the experts. Staff did not reply to FACW's objection.

The Board has allowed cross-examination of a panel of experts in other cases because it can be an efficient manner for developing the record. See e.g. I/M/O Motion by Joint Movants AT&T Communications of New Jersey, Rate Counsel and Sprint Requesting The Board Suspend and Investigate Century Link's Phase III Access Rate, BPU Docket TT02110064 (pre-filed panel testimony of AT&T's experts); I/M/O Public Service Electric & Gas Company for a Determination Pursuant to the Provisions of N.J.S.A. 40:55D-19 (Susquehanna – Roseland Transmission Line), Docket 09010035 (April 21, 2010) (PSE&G presented thirteen experts in four panels).

Here, staff's expert testimony was filed as a collaborative product of Boston Pacific and Outsmart, without any individual claiming authorship over any portion of the testimony. Therefore, it would be efficient for FACW to cross examine the panel of experts in the same manner that they provided their direct testimony. Safeguards could be established to ensure a fair opportunity for FACW to confront and explore the knowledge of each participant.

Nonetheless, FACW desires to cross each witness individually. There is no indication that any party would be unduly prejudiced if cross-examination occurs in the manner requested by FACW. Therefore, FACW's motion is **GRANTED** and the company may cross examine staff's expert witnesses in seriatim.

Opening Statements

At my direction, on or about August 27, 2012, the parties were advised that counsel may make opening statements and that statements should be limited to ten minutes. On August 28, 2013, FACW objected to this restriction and requested permission for Chris Wissemann, CEO of

FACW, to make a thirty minute opening statement. (FACW Letter Brief at 1-2, In re Petition of FACW, Docket EO11050314V (August 28, 2012)). FACW's request is **DENIED**.

FACW is represented by counsel who is fully capable of providing an opening statement on behalf of FACW. An opening statement is not evidence and there is no reason to anticipate that FACW would be prejudiced if counsel makes an opening statement. In addition, Mr. Wissemann has already pre-filed direct testimony dated June 1, 2012, October 18, 2012, and March 8, 2013, and rebuttal testimony dated March 25, 2013. Mr. Wissemann also filed updated testimony on August 9, 2013. Additional statements by Mr. Wissemann, which would not be subject to cross-examination, are not justified.

For these reasons, FACW's request is **DENIED**. Opening statements shall be limited to ten minutes by counsel only.

Live Direct Testimony

FACW has requested permission to present live direct testimony of Messrs. Wissemann and Steve Gabel. In support of this request, FACW indicates that live direct testimony is necessary "to add explanation and clarity to the record" as well as fully develop the record. (FACW Letter Brief at 2, In re Petition of FACW, Docket EO11050314V (August 28, 2012)). FACW further asserts that denying the company an opportunity for live direct testimony is a violation of FACW's procedural due process rights. I disagree.

Pursuant to N.J.A.C. 1:14-14.1, the hearing officer may require all parties to pre-file their direct testimony. The prior scheduling orders provided a full opportunity for FACW to file direct testimony, rebuttal testimony, and supplemental testimony. Mr. Wissemann pre-filed testimony on June 1, 2012, October 18, 2012, March 8, 2013, March 25, 2013, and August 9, 2013. Mr. Gabel pre-filed testimony on June 1, 2012, March 25, 2013, and August 9, 2013. The testimony of both gentlemen is within the Joint Record approved by the Board on July 29, 2013, save the August 9, 2013, testimony. Additional live testimony by Messrs. Wissemann or Gabel would either be duplicative of the pre-filed testimony or beyond the scope of the pre-filed testimony, and therefore impermissible. For these reasons FACW's motion is **DENIED**.

At the hearing FACW may present Messrs. Wissemann and Gabel for the limited purpose of moving their August 9, 2013, testimony into evidence. Likewise, Rate Counsel may present Mr. Dismukes for the purpose of moving his August 15, 2013, testimony into evidence, unless the parties consent otherwise. The Joint Record shall be moved into evidence based on the consent of the parties.

Procedural Schedule

Hearing Dates:

November 12-14, 2013
Office of Administrative Law
9 Quakerbridge Plaza
Hamilton Twp., NJ 08619
10:00 a.m.

Post Hearing Briefs

within 15 days¹

¹ Pursuant to N.J.A.C. 1:1-14.7 the submission time frame shall commence upon receipt of the

Reply Briefs

within 15 days

Board Action

TBD

Upon due consideration, I **HEREBY ADOPT** the revised schedule. N.J.A.C. 1:1-18.1 and N.J.A.C. 1:1-18.6 provide guidance on the time frame for issuing final agency decisions in contested matters.

I **HEREBY ISSUE** this prehearing Order. All other aspects of the prior procedural orders shall remain in effect. This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: 10-15-2013

BY:


ROBERT M. HANNA

hearing transcript. The transcript shall be ordered immediately following the hearing.

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FOR THE APPROVAL OF THE STATE WATERS PROJECT AND AUTHORIZING
OFFSHORE WIND RENEWABLE ENERGY CERTIFICATES
DOCKET NO. EO11050314V

SERVICE LIST

BOARD OF PUBLIC UTILITIES

44 South Clinton Avenue, 9th Floor
PO Box 350
Trenton, NJ 08625-3300

Kristi Izzo, Secretary
Kristi.Izzo@bpu.state.nj.us

Mary Beth Brenner
Chief of Staff
Marybeth.brenner@bpu.state.nj.us

Tricia Caliguire
Chief Counsel
Tricia.Caliguire@bpu.state.nj.us

Mark Beyer, Chief Economist
Office of the Economist
mark.beyer@bpu.state.nj.us

Jerome May, Director
Division of Energy
Jerome.May@bpu.state.nj.us

Jacob Gertsman, Esq., Legal Specialist
Counsel's Office
Jake.Gertsman@bpu.state.nj.us

Elizabeth Ackerman, Director
Office of Clean Energy
Elizabeth.Ackerman@bpu.state.nj.us

Anne Marie McShea
Office of Clean Energy
a.mcshea@bpu.state.nj.us

RATE ADVOCATE

31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07102

Stefanie Brand, Esq., Director
Division of the Rate Counsel
sbrand@rpa.state.nj.us

Felicia Thomas-Friel, Esq.
ftthomas@rpa.state.nj.us

Henry M. Ogden, Esq.
hogden@rpa.state.nj.us

Acadian Consulting Group
5800 One Perkins Place Drive
Building 5, Suite F
Baton Rouge, LA 70808

David Dismukes, Consulting Economist
dismukes@lsu.edu

CITY OF ATLANTIC CITY

1301 Bacharach Blvd.
Suite 704
Atlantic City, NJ 08401

Rhonda Williams
City Clerk

DEPARTMENT OF LAW & PUBLIC SAFETY, DIVISION OF LAW, PUBLIC UTILITIES

124 Halsey Street, 5th Floor
P.O. Box 45029
Newark, NJ 07101

Veronica Beke
Deputy Attorney General
veronica.beke@dol.lps.state.nj.us

Carolyn McIntosh
Deputy Attorney General
Carolyn.McIntosh@dol.lps.state.nj.us

Alex Moreau
Deputy Attorney General
alex.moreau@dol.lps.state.nj.us

Marisa Slaten
Deputy Attorney General
marisa.slaten@dol.lps.state.nj.us

PETITIONER

Fishermen's Atlantic City Windfarm, LLC
985 Ocean Drive
Cape May, New Jersey 08204

Daniel Cohen
President
(609) 425-1044
(609) 884-3261 Fax
daniel.cohen@fishermensenergy.com

Paul Gallagher, Esq.
General Counsel
(609) 226-7206
(609) 884-3261 Fax
gallagherlaw@hotmail.com

PETITIONER OREC COUNSEL

Inglesino, Pearlman, Wyciskala, & Taylor, LLC
600 Parsippany Road, Suite 204
Parsippany, New Jersey 07054-3715
(973) 947-7111
(973) 887-2700 (fax)

Stephen B. Pearlman, Esq.
(973) 947-7133
spearlman@iandplaw.com

Denis F. Driscoll, Esq.
(973) 585-6988
ddriscoll@indplaw.com

Justin A. Marchetta, Esq.
(973) 947-7163
jmarchetta@iandplaw.com

PETITIONER OREC ADVISOR

Gabel Associates
417 Denison St.
Highland Park, New Jersey 08904
(732) 296-0770
(732) 296-0799 (fax)

Steven Gabel, President
(732) 296-0770
steven.gabel@gabelassociates.com

FOR ATLANTIC CITY ELECTRIC COMPANY

Philip J. Passanante, Esq.
Associate General Counsel
Atlantic City electric Company
500 North Wakefield Drive – 92DC42
PO Box 6066
Newark, Delaware 19714-6066

FOR JERSEY CENTRAL POWER AND LIGHT COMPANY

Gregory Eisenstark, Esq.
Morgan, Lewis & Bockius, LLP
89 Headquarters Plaza North, Suite 1419
Morristown, NJ 07960

Lawrence E. Sweeny
Kevin Connelly
Tom Donadio
Jersey Central Power and Light Company
300 Madison Ave
Morristown, NJ 07962

Arthur E. Kotkosz, Esq.
FirstEnergy Corp.
76 S. Main Street
Akron, OH 44308

FOR PUBLIC SERVICE ELECTRIC & GAS COMPANY

Alexander C. Stern, Esq.
Assistant General Regulatory Counsel
PSEG Services Corporation
80 Park Plaza T5G
Newark, NJ 07102

FOR ROCKLAND ELECTRIC COMPANY

Susan J. Vercheak, Esq.
Assistant General Counsel
c/o Consolidated Edison Company of New York, Inc.
Law Department, Room 1815-S
4 Irving Place
New York, NY 10003